Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1813

SAMUEL H. SLOAN,

Petitioner,

against

FRANK G. RAICHLE, CHEMICAL BANK, CHASE MANHATTAN BANK, FIRST NATIONAL BANK OF CHICAGO, MARINE MIDLAND BANK, LINCOLN FIRST BANK OF ROCHESTER, THE TRAVELER'S INDEMNITY CO., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinion Below

The decision of the United States Court of Appeals for the Second Circuit was oral and from the bench. It, in effect, summarily affirmed the District Court. Evidently the tape recording of the opinion is inaudible (see petition).

The District Court wrote no opinion but its order reads as follows:

"ORDERED that the motion is in all respects denied. Due notice was given to all stockholders pursuant to the order of this court. There is no showing that a different result would be had if the matter were reopened." (Appendix E, p. 7a).

Question Presented

Was the District Court correct in denying a motion to vacate the order of insolvency made on the part of a stockholder who did not appear at the insolvency hearing, but to whom notice of the hearing which resulted in the order had been duly mailed, especially in the absence of any affidavit of merits or other showing that a different result would be had if the matter were reopened?

Statement of the Case

This case arises out of a Chapter X bankruptcy proceeding involving Stirling Homex Corporation. The voluntary petition of that corporation was filed in the United States District Court for the Western District of New York on July 11, 1972. Frank G. Raichle was appointed Reorganization Trustee on July 13, 1972. Contrary to petitioner's statement at p. 17 of his application, a meeting of stockholders and creditors was held on September 11, 1972 in accordance with the direction contained in the order appointing Mr. Raichle Reorganization Trustee. Thereafter, moved by opportunism, petitioner accumulated shares of preferred and common stock of Stirling Homex Corporation at a few cents a share. As petitioner admits at p. 6 of his petition, some of these shares were transferred into his name on the books of the transfer agent and he thus became a stockholder of record.

Subsequent purchases were not transferred into his name. All notices were mailed to petitioner at the address in New York City given by him on the books of the transfer agent. Some of his later purchases were mailed to the then counsel for respondent from an address in Virginia, but with no request by petitioner that his address be changed on the books of the transfer agent—indeed, it is conceded that no such request was ever made.

On June 13, 1977 the District Court, after notice and a hearing, entered an order finding Stirling Homex Corporation to be insolvent and ruled that the stockholders were not entitled to vote on a Plan of Reorganization or share in the distribution of the proceeds of a liquidation of the company's assets. See 17a of petition. Notice of the hearing which resulted in this order was duly mailed to petitioner, see petition 7a. Later, and on September 29, 1977, petitioner moved to reopen the insolvency order, petition 7a. His motion was in all respects denied by the District Court, petition 7a. Petitioner appealed to the United States Court of Appeals for the Second Circuit from the order denying a reopening and vacating of the insolvency order and the District Court's denial was upheld, petition 2a.

Petitioner now applies to this Court for a writ of certiorari to review the decision of the Court of Appeals.

Reasons for Denying the Writ

1. The petition claims no conflict of decisions and demonstrates that the decision below turns upon its own facts and will affect no other case. Indeed, it meets none of the criteria of which we are aware upon which petitions for certiorari are granted.

2. In the first place, petitioner's appeal is moot. The order appealed from denied a motion on the part of petitioner to vacate an order of the United States District Court for the Western District of New York sitting as a bankruptcy court which found the debtor insolvent. See Appendix H, Exhibit 1, annexed to petition for certiorari, p. 17a of said petition. Petitioner moved to vacate this order on November 14, 1977, claiming that although he was a stockholder, having purchased his shares subsequent to the filing of the bankruptcy petition, he had not received notice of the insolvency hearing. Concededly some of petitioner's shares had been transferred to his name on the books of the transfer agent, although some had not. The transfer agent filed an affidavit of service strictly in accordance with the District Court's order with respect to notice. Petitioner was on the list of those to whom notice was sent. His motion to vacate was denied on February 16, 1978 by the District Court in the following language:

> "ORDERED that the motion is in all respects denied. *Due notice was given to all stockholders pursuant to the order of this court.* There is no showing that a different result would be had if the matter were reopened." See Appendix E, petition 7a. (Emphasis added.)

Subsequently and on March 20, 1979, the Trustee filed a Plan of Reorganization in the nature of a plan of liquidation and requested the District Court to update and find anew that the debtor was insolvent as a basis for approving the plan of liquidation. Petitioner not only received a notice but appeared *pro se* on June 11, 1979, the return date of the notice to approve the Plan and participated at length on the hearing on the Plan. He cross-examined the Trustee and he testified on his own behalf. The District Court found the Plan worthy of consideration and transmitted the same to the Securities and Exchange Commission for its report as provided in Section 172 of the Bankruptcy Law. It will be on the basis of the finding to be made on the proof offered at this hearing that the approval or disapproval of the Plan will be made.

3. At the outset of the Trustee's argument before the Court of Appeals it was requested that the motion to dismiss be treated as a motion for summary affirmance. On p. 12 of petitioner's application for a writ the following appears, "If an appeal is truly lacking in merit, an appropriate course might be for a court to entertain a motion for summary affirmance."

4. There is no merit and in the record no support for petitioner's statements concerning "a running feud between Judge Timbers and Petitioner", petition p. 14. Much less is there any basis for the claim that "Judge Timbers may have personally erased the tape, (of the argument in the Court of Appeals)", petition p. 13, in order to conceal an innocuous pleasantry addressed to the Trustee by Judge Timbers. Since petitioner has made the same charge before the Court of Appeals on a motion for a rehearing made after the filing of his petition for a writ of certiorari, we are annexing to this brief a copy of our answering affidavit in the Court of Appeals as Appendix "A".

Conclusion

The application for a writ of certiorari should be denied.

Dated: June 29, 1979

Respectfully submitted,

FRANK G. RAICHLE,
Reorganization Trustee of
Stirling Homex Corporation,
Pro Se,
10 Lafayette Square,
Buffalo, New York 14203,
Tel.: (716) 852-7587.

APPENDIX "A"

Answering Affidavit

UNITED STATES COURT OF APPEALS
For the Second Circuit

In the Matter of
STIRLING HOMEX CORPORATION,
Consolidated Debtor.

SAMUEL H. SLOAN,
Appellant,

FRANK G. RAICHLE, Reorganization Trustee,
Appellee,

CHEMICAL BANK, *et al.*,
Appellees.

Docket No. 78-5016

State of New York }
County of Erie } ss.:

FRANK G. RAICHLE, being duly sworn, deposes and says:

1. I am a member of the bar of this court and the Reorganization Trustee in the Chapter X proceeding, in the course of which this appeal was taken from an order of the

United States District Court for the Western District of New York sitting as a bankruptcy court in this proceeding. The order appealed from denied a motion on the part of the appellant to open or vacate an order finding Stirling Homex Corporation insolvent.

2. I would not file this affidavit since the lack of merit to appellant's application appears from the papers and proceedings had and taken herein before this court, were it not for the unfair and baseless personal attack on Judge William H. Timbers contained in appellant's affidavit centering around a pleasantry made by Judge Timbers when this case was argued. Since a similar attack is made in appellant's petition for certiorari to the Supreme Court of the United States and is now spread on the record of this court, I desire to state the facts which gave rise to Judge Timbers' greeting.

3. When I arose to argue this appeal, Judge Timbers greeted me in substance as follows: "Mr. Raichle, I am glad to see you and I bring you greetings from (mentioning the name of *his* dog, not mine)." I inquired concerning the health of his dog and he replied that his dog was well. The background of the occasion for this pleasantry on the part of Judge Timbers is as follows:

4. Some few years ago my wife and I had a suite or room on the ground floor of the Equinox Hotel in Manchester, Vermont during a Second Circuit Judicial Conference meeting. One morning at about 7:30 I heard a screech of brakes, a dull thud and the agonizing cry of an injured dog. I looked out the window and saw a beautiful elkhound dog on the street in obvious pain, attempting to reach the curb. The driver of the car which had struck him did not stop. I went out into the street and brought the dog inside and carefully

examined him to see if he had any broken bones or was otherwise seriously injured. I reached the conclusion that he was more frightened than injured. Not knowing to whom he belonged, I decided to let him out in the hope that he would seek his home among the residences along the street in the vicinity of the hotel. Instead of so doing, and still frightened, the dog ran around toward the back of the hotel and sought refuse through a small basement window opening into what I believed was a coal bin. I started to go to the office of the hotel with the intention of asking management to assist me in getting the dog out of his predicament. Either in the lobby of the hotel or near it I met Judge Timbers who was looking for his dog. It turned out to be the same dog which I had attempted to befriend. I took Judge Timbers to the window where the dog had entered the hotel basement and was there while Judge Timbers extricated his dog and took him with him.

5. I know Judge Timbers only through the privilege of appearing before him in court on no more than two or three occasions, and meeting him once or twice at meetings of the Judicial Conference of the Second Circuit. I know and respect him highly and resent appellant's attack upon him. I deny that there is anything in our brief contacts which would justify a suggestion that he recuse himself from any case of mine which should come before him. Appellant's distorted statement that for some reason or other Judge Timbers was taking care of a dog of mine is not true. I have a dog, a German shepherd, but Judge Timbers has never seen him. Appellant's charge that Judge Timbers erased the tape recording of the oral argument to conceal his innocuous pleasantry is preposterous.

6. I, too, wish that the tape were audible because it would reveal the fact that at the outset of my oral argument I said that although the motion papers spoke of a dismissal of the

appeal on the ground that it was frivolous, it was my position that the motion could be treated as one for summary affirmance. In any event, the appeal is wholly without merit. Appellant's own counsel, Ephraim Liebowitz, had moved to be permitted to withdraw with the statement that he believed the appeal was without merit. See papers on his motion which are on file with this court. Mr. Liebowitz' motion was granted.

7. The motion for reargument of this appeal and for other relief should be in all respects denied.

FRANK G. RAICHLE.

Sworn to before me this 13th day of June 1979.

HELEN B. GERBER,
Notary Public, State of New York,
Qualified in Erie County,
My Comm. Expires March 30, 1981.